Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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No. 82-1534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EUGENE S. NEUFELD,

Petitioner,

vs.

BRUCE BAMBROUGH, President, Compuscan, Incorporated;
WARREN E. SMITH, Director, New Jersey Division on Civil Rights;
JOHN J. DEGNAN, Individually and as Attorney General of New Jersey;
ROBERT A. LEONARD, Individually and as former President of Compuscan;
VERNON N. POTTER, Individually and as former Director, New Jersey Division on Civil Rights;
STANLEY C. VAN NESS, Individually and as the Public Advocate of New Jersey;
NORBERT STEINBERGER, Individually and as Executive Vice President of Compuscan;
C. Y. ALSTON, Individually and as Branch Manager, Paterson Office, New Jersey Division of Civil Rights;
JOSEPH H. RODRIGUEZ, As Chairman, Commission of Investigation, State of New Jersey;
MARVIN WEISS, Individually and as Vice President, Compuscan;
JAMES SINCAGLIA, Individually and as Chief, Bureau of Enforcement, New Jersey Division on Civil Rights;
WILLIAM T. BURGIN, Individually and as Director Compuscan;
JUDITH E. RODNER, Individually and as Deputy Attorney General for Civil Rights, New Jersey;
MARTIN BRODY, Individually and as Director, Compuscan;
JUDITH S. MUSICANT, Individually and as Deputy Director, New Jersey Division on Civil Rights;
MICHEL R. BAILLEUL, as Director Compuscan;
MICHAEL L. ALLEN, as Director Compuscan;
NORMAN FRANK, Individually and as Vice President-Finance and Treasurer, Compuscan;
SEYMOUR NAPS, Individually and as Vice President Compuscan;
JULIAN F. OLNEY, Director of Compuscan;
JACOB MILLMAN, Director of Compuscan;
CAROL M. DARROW, Individually and as Corporate Secretary of Compuscan;
BARBARA BERGSTROM, Individually and as Personnel Manager of Compuscan;
MARGUERITE M. SCHAFFER, Individually and as Attorney for Compuscan;
GREENBERG, MARGOLIS and ZEIGLER;
LEON, WEILL and MAHONEY;
SECURITIES CORPORATION; COMPAGNIE PARTICIPATIONS et d'INVESTMENTS HOLDINGS S.A. (C.P.I.H.); COMPUSCAN INCORPORATED; NEW JERSEY DIVISION ON CIVIL RIGHTS, DEPARTMENT OF LAW AND PUBLIC SAFETY and UNITED JERSEY BANK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT, ROBERT LEONARD'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER W. TILL,
Attorney for Respondent,
Robert A. Leonard.

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On the Brief
PETER W. TILL

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QUESTIONS PRESENTED

The petitioner provides no statement of Questions Presented for Review.

The question, if any at all—which should be properly before this Court, is whether the United States Court of Appeals for the Third Circuit properly affirmed the Order of the District Court (Pa3) [which incorporated the Magistrate's Report and Recommendation (Pa6)] dismissing the Amended Complaint—where the petitioner failed to plead any facts with respect to the respondent, Robert A. Leonard, either as an officer of the respondent, Compuscan, Inc. ("Compuscan") or, in the alternative, individually.

As will be discussed *infra*, the facts and conclusions of the petitioner are erroneous and not supported by the Memorandum Order of the United States District Court for the District of New Jersey (Pa3), Magistrate's Report and Recommendation (Pa6) and Transcript of Proceedings Before the Magistrate, February 13, 1979 (Pa72).

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OPINIONS BELOW AND JURISDICTION

Respondent, Robert A. Leonard, concurs in petitioner's statement of the opinions below and does not question the jurisdiction of this Court.

STATUTES INVOLVED

The petitioner sets forth no contention in the Court below that the statutes it refers to were directly involved in this matter, nor any dispute over the meaning of said statutes.

COUNTER-STATEMENT OF THE FACTS AND THE CASE

This matter involves claims of constitutional violations (substantive and procedural) and claims of violations of civil rights under color of state law resulting in alleged employment discrimination, pursuant to 42 U.S.C. 1981, 1983, 1985, 1986 and 2000(d) and (e).

On June 30, 1977, Marguerite Lee, an employee of respondent, Compuscan, filed a Complaint with the State of New Jersey, Department of Law and Public Safety, Division on Civil Rights, alleging discrimination against respondents Compuscan, Norbert Steinberger and petitioner.

Ultimately, the Complaint, brought by Marguerite Lee, was administratively terminated with a finding by the Division of Civil Rights of no cause for action.

On October 17, 1978, a Complaint was filed by the petitioner with the Clerk, United States District Court, Newark, New Jersey, charging 28 individuals, corporations, and governmental agencies with discrimination against the petitioner, in conjunction with his firing from the respondent, Compuscan, on or about August 19, 1977, which Complaint was superseded by an Amended Complaint filed with the Clerk, United States District Court, Newark, New Jersey, on November 14, 1978.

On February 28, 1980, the United States District Court for the District of New Jersey entered an Order (Pa3), adopting the Magistrate's Report and Recommendation (Pa6), granting summary judgment in favor of all the respondents and against the petitioner, with costs.

Petitioner, seeking a writ of certiorari, claims that at each and every stage of the judicial proceedings

hereinbelow, his claims of constitutional violations were neither properly analyzed [by the United States District Court for the District of New Jersey (Pa3 and Pa6)] nor given serious consideration when allowed the very rare opportunity to present oral argument before the United States Court of Appeals for the Third Circuit.*

It is impossible to ignore the petitioner's "attitude." At page 3 of the Petition, the section entitled "Statement of the Case," the petitioner proceeds with a frontal assault on the Federal Judicial system instead of an appropriate analysis of the facts.

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* Rules of the United States Court of Appeals For the Third Circuit, Rule 12(6)(a) and (b) says:

(6) ORAL ARGUMENT.

(a) Oral argument shall be allowed in all cases unless the panel, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed.

Any party to the appeal shall have the right to file a statement with the Court setting forth the reasons why, in his opinion, oral argument shall be heard. Such statement shall be filed with the Clerk within seven (7) days after the filing of appellee's or respondent's brief. The request shall set forth the amount of argument time required.

Criteria for determining whether there should or should not be oral argument are:

(1) whether the appeal is frivolous; or

(2) whether the dispositive issue or set of issues has been recently authoritatively decided; or

(3) whether the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(b) *Notice of argument; postponement.* The Clerk shall advise all parties whether oral argument is to be heard, and, if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.

> *There is an alarming tendency in the Federal Judicial system to relegate pro se litigants and others who bring certain kinds of disfavored claims to a perceived second class system of justice:* their cases are referred in a wholesale fashion to magistrates, who are not Article III judges, and the district judges fail to perform the sort of thorough and independent de novo review that is statutorily required by the magistrates Act, 28 U.S.C. §636 (b)(1)(B), and constitutionally mandated by Article III, see *U.S. v. Raddatz*, 447 U.S. 667 (1980) and *Wingo v. Wedding*, 418 U.S. 461 (1974). The *inadequate attention paid by judges to certain classes of litigants distorts the purpose and integrity of the judiciary* and creates a perception that the courts do not dispense justice to those disfavored groups who may most need the thoughtful attention of a fully qualified, independent Article III judge.
>
> Petitioner Neufeld is one of thousands of such *pro se* civil rights litigants who has been *railroaded* through the Article III courts without receiving adequate attention from an Article III judge. (Emphasis added)

At page 7 petitioner comments on the consideration given his "purported" constitutional claims by the district judge:

> The district judge filed an order on February 28, 1980, adopting the Magistrate's Report, 'for the reasons stated therein,' (A3). In plain contravention of his statutory and constitutional obligation to make a *de novo* determination of the magistrate's findings, the judge indicated that he had examined only the magistrate's report and the objections thereto. He did not examine the amended complaint or other pleadings, the briefs, the record, opposing

affidavits, the transcript, or records of the company submitted by petitioner or documents submitted by the State. Thus, it is evident that the judge did not perform a *de novo* record review.

Again, at page 7, referring to the United States Court of Appeals for the Third Circuit consideration of his claim and oral argument, petitioner's remarks are nothing short of insulting:

> *It was evident at the argument, however, that opportunity to present a statement was a pro forma attempt to palliate petitioner's desire to receive the attention of an Article III judge.* Almost immediately thereafter, on August 4, 1982, the Court of Appeals affirmed the lower court by judgment order, without opinion (A-1). The Court of Appeals also denied, without opinion, petitioner's motion for rehearsing (October 14, 1982 A-49). (Emphasis added).

The petitioner refuses to accept the fact that the allegations fail to rise to the level of a constitutional claim.

Petitioner's impression of the consideration given by the United States Court of Appeals for the Third Circuit demonstrates the petitioner's artificially heightened perception that he has purportedly been "railroaded," when, in fact, he has totally and indefatigibly failed to allege any facts, despite numerous opportunities to do so. Carrying petitioner's theory of being "railroaded" to its logical (or illogical) conclusion, the United States Court of Appeals for the Third Circuit could then do nothing right in the eyes of the petitioner. With respect to the petitioner's hopes, the United States Court of Appeals for the Third Circuit might well fall within the old maxim, "damned if they do and damned if they don't." For example, had the United States Court of Appeals for the

Third Circuit denied petitioner's request for oral argument, then the petitioner would argue that his rights had been denied. However, the petitioner was extended the very rare opportunity to present oral argument. Notwithstanding, the petitioner was not satisfied, as such opportunity was merely" a pro forma attempt to pallitate petitioner's desire to receive the attention of an Article III judge."

In the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, the petitioner omits and distorts salient facts and mischaracterizes and emasculates the Magistrate's Report and Recommendation (Pa6), the Order of the District Court (Pa3) and the Order of the United States Court of Appeals for the Third Circuit (Pa1).

The petitioner's contention that his claims did not receive adequate attention, with petitioner characterizing his treatment as being "railroaded" is without support anywhere. On the contrary, while the United States Magistrate assessed costs against the petitioner (Pa44), the United States District Court (Pa5) and United States Court of Appeals for the Third Circuit (Pa-2) entered their respective Orders without costs against the petitioner.

The petitioner's characterizations of the United States District Court and United States Court of Appeals for the Third Circuit, in connection with the scope of review given a Magistrate's Report and Recommendation and Memorandum Order of the United States District Court are grossly inaccurate. The Magistrate's Report and Recommendation and United States District Court's Memorandum Order and the affirmance by the United States Court of Appeals for the Third Circuit, speak for themselves and very simply do not say what the petitioner asserts.

ARGUMENT

Point I

This Court should deny the Petition for Certiorari as the United States Court of Appeals for the Third Circuit properly affirmed the decision of the United States District Court granting Summary Judgment and further no important issue of Federal Law has been presented.

As his reasons for seeking the grant of the writ, petitioner argues that:

(1) The District Court's failure to review all the material necessary to make a *de novo* determination conflicts with standards adopted by this court and by other Circuits, and does not comport with the Federal Magistrate Act or with Article III;

(2) Adoption of a magistrate's recommended decision without an independent *de novo* review by an Article III district judge constitutes an unlawful delegation of judicial power to a non-Article III officer;

(3) A litigant who has invoked the power of an Article III court and has not consented to reference to a magistrate has a right founded in the due process clause of the Fifth Amendment and in Article III to a *de novo* determination and opinion stating reasons for denying relief under an Article III judge;

(4) Routine non-consensual referals of *pro se* cases to magistrates for depositions that effectively are final violates the due process clause of the Fifth Amendment and Article III; and

(5) State officials are not immunized from liability for acting contrary to antidiscrimination statutes by virtue of the Eleventh Amendment.

Petitioner's arguments 1 through 4 are addressed to the petitioner's contention that he is entitled to *de novo* review, See *United States v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406, 65 L.Ed. 2d 424 (1980); *Pendleton v. Rumsfeld*, 628 F.2d 102, 106 (D.C. Cir. 1980); *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982), which, according to the petitioner, means that the District Court Judge is required to undertake and conduct a *de novo* hearing. That is simply not the state of the law. In *United States v. Miller* 609 F.2d 336, 340 (8th Cir. 1979), the Court said:

> It should be clear that on these dispositive motions, the statute [28 U.S.C. §636 (b) (1)] calls for a *de novo* determination, not a *de novo* hearing. [*United States v. Raddatz* 447 U.S. 667, 674, 100 S. Ct. 2406, 65 L.Ed.2d 424 (1980)].

De novo determination does not mean a *de novo* hearing at which the United States District Court must rehear the evidence. *National R.R. Passenger Corp. v. Koch Industries, Inc.*, 701 F.2d 108 (10th Cir. 1983).

It is crystal clear that the United States District Court afforded the petitioner every possible opportunity to be heard, to respond and to thereafter make submissions once again.

There is further no question that the Memorandum Order (Pa3) was not a pro forma exercise, but rather was carefully considered over a long period of time and only signed after careful consideration and review of the voluminous briefs, appendices and affidavits filed by the petitioner (Pa4-9 to 11). Again the United States District

Court takes particular note (Pa4-17 to 19) with respect to their "considering the voluminous material submitted by plaintiff and considered by Judge Perretti, . . ."

The petitioner has mischaracterized the conduct of the United States District Court. Their review of the matter hereinbelow constituted an independent *de novo* review by an Article III Judge.

Point II

The petitioner refuses to address his failure to plead any involvement of the respondent, Robert A. Leonard, whatsoever, and for good reason—were the petitioner to do so, this Court could then only come to one conclusion—that the dismissal of the Amended Complaint against the respondent, Robert A. Leonard, was properly affirmed.

The Amended Complaint (Pa164) refers to the respondent, Leonard, in four separate paragraphs:

> 8. Defendant, ROBERT A. LEONARD (individually), is the former Chairman and President of CompuScan, and is now a Consultant to CompuScan, Incorporated. (Pa172).
>
> 94. In June, 1977, ROBERT A.LEONARD, resigned, but remained on as a Consultant, to the Company. After this period, difficult times appeared. The Company experienced over a $7,000,000 loss in 1977 and a great reduction in sales. The long term debt is also $7,000,000 and prediction of future trends unreliable. What was predicted as a $3,500,000 yearly loss in May, 1978 became a $7,000,000 loss by August, 1978 and unknown factors still remain, concerning 1977 operations! (Pa220) (Pa87-6 to 13; Pa124-9 to 20).

98. AS AND FOR A FIRST CAUSE OF ACTION—Plaintiff repeats and realleges each and every allegation contained in paragraphs marked "52" through "62" of this complaint with the same force and effect as if set forth at length herein. Defendants CompuScan, BAMBROUGH, LEONARD, STEINBERGER, WEISS, NAPS, FRANK, DARROW and BERGSTROM provided special and different employment treatment at CompuScan based on color/race which included disparate discipline, fringe benefits, performance reviews, opportunity to transfer, immunity from dismissal and pay raises based upon color/race. Plaintiff opposed these unlawful practices and was dismissed in retaliation. By these and other acts Defendants discriminated against Plaintiff in violation of §704 (a) of 42 U.S.C. 2000e-2eal. Civil Rights Act 1964 Title VII *"color-race."* (Pa224).

99. AS AND FOR A SECOND CAUSE OF ACTION—Plaintiff repeats and realleges each and every allegation contained in paragraphs marked "61 through 64" of this Complaint with the same force and effect as if set forth at length herein. Defendants CompuScan, BAMBROUGH, LEONARD, STEINBERGER, WEISS, NAPS, FRANK, DARROW AND BERGSTROM provided special and different employment treatment at CompuScan based upon national origin such as opportunity, advancement and salary increases. Plaintiff treated employees equal and opposed these unlawful practices and was dismissed in retaliation. By these and other acts Defendants discriminated against Plaintiff in violation of §704(b) and §703(a) of 42 U.S.C. 2000 et seq. Civil Rights Act of 1964 Title VII—*"national origin."* (Pa225) (Pa87-6 to 13; Pa124-9 to 20).

The paragraphs, as set forth hereinabove, are the only references to the respondent, Leonard, in the Amended Complaint (Pa164).

The Magistrate's Report and Recommendation (Pa6) commented on the above paragraphs of the Amended Complaint (Pa164) as follows:

> *The Defendants.*
>
> There are 3 general classifications into which the named defendants may be grouped: (1) plaintiff's former employer, Compuscan, and persons connected with Compuscan; (2) companies or persons with whom Compuscan did business; (3) state employees or officials sued both individually and in their official capacities.
>
> *Group 1:*
>
> Reading the complaint with as broad an interpretation as possible regarding the Compuscan group, plaintiff appears to claim that Steinberger instructed him to treat black employees more leniently than non-blacks, and when he sought the aid of Darrow Bergstrom and Naps they failed to correct the situation. As a result of plaintiff's obligations to this unlawful company policy, he was fired in retaliation. Other Compuscan people are also as defendants: Bambrough, president; Leonard, former president; Weiss, vice-president; Frank, vice-president/treasurer; and directors Burgin, Brody, Bailleul, Allen, Olney and Millman. Other than mentioning these defendants in the caption, the complaint makes no reference to them except to allege in conclusory tests that they discriminated against plaintiff. The complaint clearly fails to state a claim against these ten defendants upon which relief can be granted.

The Petitioner has failed, even with the filing of an Amended Complaint (Pa164), to allege that the respondent, Leonard, abrogated his rights under 42 U.S.C. 1981, 1983, 1985, 1986, and 2000(d) and (e).

The Amended Complaint (Pa164) further fails to allege that such conduct may have arisen in respondent, Leonard's personal or official capacity.

It is further without dispute that such conduct took place only after the respondent, Leonard, was no longer associated with the respondent, Compuscan.

Even had the petitioner attempted to make a claim against the respondent, Leonard, on the theory of *respondeat superior*, the Amended Complaint (Pa164) was properly dismissed.

> . . . the doctrine of *respondeat superior* has no application in civil rights actions. See Bracey v. Grenoble, 494 F.2d 566 (3rd Cir. 1974); Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied sub nom. Employee-officer John #1765 Badge Number v. Johnson, 414 U.S. 1033, 94 S. Ct. 462, 38 L.Ed. 2d 32 (1973); Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973); Schumate v. People of State of New York, 373 F. Supp. 1166 (S.D.N.Y. 1974).

Padover v. Gimbel Bros., 412 F. Supp. 920 (E.D. Pa. 1976).

No wrongful conduct, by the respondent, Leonard, has been pleaded. Unless the alleged wrongful conduct has been pleaded, the Complaint must be dismissed. The United States Court of Appeals for the Third Circuit said again, in *Padover, supra:*

> [i]t plainly is the rule in this Court that Section 1983 actions must be specifically pleaded in order to withstand a motion to dismiss, Kauffman v. Moss,

> 420 F.2d 1270, 1275 (3d Cir.) cert. denied, 400 U.S. 846, 91 S. Ct. 93, 27 L.Ed.2d 84 (1970); Negrich v. Hohn, 379 F.2d 213, 215 (3d Cir. 1967); and that broad, conclusory allegations, are insufficient to state a claim upon which relief may be granted, id.; Salvati v. Dale, 364 F. Supp. 691, 700 (E.D. Pa. 1973).

Padover, supra at 924.

Neither was it pleaded that the respondent, Leonard, was an actual participant in any violative conduct. In *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3d Cir. 1978), the United States Court of Appeals for the Third Circuit, said:

> A corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he is an actual participant in the tort. See, e.g., Solo Cup Co. v. Paper Machinery Corp., 359 F.2d 754 (7th Cir. 1966); 3A Fletcher's Cyclopedia of Corporations §1158 (perm. ed. 1975). (Pa85-20 to Pa88-8; Pa125-10 to Pa128-20)

The Amended Complaint (Pa164) including, but not limited to, paragraphs 8 (Pa172), 94 (Pa220), 98 (Pa224) and 99 (Pa225). (Pa124-9 to 20) fails to set forth any facts with respect to respondent, Leonard.

The Petitioner acknowledges that respondent, Leonard resigned from Compuscan in June, 1977 (Paragraph 94; Pa87-6 to 13; Pa124-9 to 20) prior to August 19, 1977, the effective date of the petitioner's alleged wrongful firing (Pa109-14 to 16; Pa138-3 to 5). See *Savage v. Kibbee*, 426 F. Supp. 760, 766-67 (S.D.N.Y. 1976).

The dismissal of the Amended Complaint (Pa164) was properly affirmed absent any facts setting forth a justiciable case or controversy against the respondent, Leonard.

CONCLUSION

Petitioner sets forth no special or important reasons for granting of the writ.

Petitioner mischaracterizes the findings and conclusions of the United States Magistrate, United States District Court Judge and the United States Court of Appeals for the Third Circuit.

The affirmance of the United States District Court by the United States Court of Appeals for the Third Circuit was properly reviewed under the scope of review determined as proper by this Court.

The Petition should be denied.

Respectfully submitted,

/s/ Peter W. Till

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